85-717

Supreme Court, U.S.
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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARTHUR QUILLER, LILLIE MAE QUILLER, and All Other Persons Similarly Situated,

Cross-Petitioners,

v.

BARCLAYSAMERICAN/CREDIT, INC.,

Cross-Respondent.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

JAY M. SAWILOWSKY
Counsel of Record
902 Georgia Railroad Bank Building
Augusta, Georgia 30901 (404) 722-8853

JOHN B. LONG
Nixon, Yow, Waller & Capers
1500 Georgia Railroad Bank Building
Augusta, Georgia 30901
(404) 722-7541

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED FOR REVIEW

1. Does division 2 of the panel opinion reinstated by the en banc opinion of the United States Court of Appeals for the Eleventh Circuit give a mobile home finance company the right to claim federal preemption of an established state maximum rate of finance charge on the financing of a mobile home even though its contract with the consumer denies those concomitant consumer benefits mandated by Congress in the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, Title V, § 501, 94 Stat. 161 and the Regulations promulgated thereunder?

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**On Cross-Petition For Writ Of Certiorari
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CROSS-PETITION FOR WRIT OF CERTIORARI

OFFICIAL REPORTS OF OPINIONS BELOW

The panel opinion of the Eleventh Circuit Court of Appeals in *Quiller v. BarclaysAmerican/Credit, Inc.* is reported at 727 F.2d 1067 (11th Cir. 1984), and the *en banc* opinion of the Eleventh Circuit in said case is reported at 764 F.2d 1400 (11th Cir. 1985) (en banc). The opinion of the United States District Court for the Southern District of

Georgia dismissing cross-petitioners' complaint for failure to state a claim is unreported.

Copies of all three of the aforesaid opinions are included in the Appendix to BarclaysAmerican's Petition for Certiorari respectively at pages A1-A9, B1-B10 and C1.

STATEMENT OF THE GROUNDS OF JURISDICTION

The judgment sought to be reviewed was entered on July 8, 1985 *en banc* by the United States Court of Appeals for the Eleventh Circuit, which reinstated the panel opinion.

The within Cross Petition for Writ of Certiorari is presented within thirty days of receipt of the Petition for Certiorari pursuant to Rule 19.5 of this Court. The Quillers received the Petition for Certiorari on September 28, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Depository Institutions Deregulation and Monetary Control Act of 1980, 94 Stat. 161

Official Code of Georgia § 11-9-503

12 C.F.R. § 590.4

O.C.G.A. § 11-9-503 is set forth in Appendix A to this Cross-Petition for Certiorari. The Depository Institutions Deregulation and Monetary Control Act of 1980 (hereinafter referred to as DIDMCA) and Regulation are set forth on pages 2-3 of BarclaysAmerican Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The statement of the case is set forth in the statement of the case in the Quillers' brief opposing BarclaysAmerican's Petition for Certiorari and is incorporated herein by refer-

ence thereto. The contract in question is reproduced in the appendix to BarclaysAmerican's Petition for Writ of Certiorari: at I-1 to I-4 and M-8 to M-11.

ARGUMENT

Introduction

As the Quillers' brief opposing the petition for certiorari demonstrates,the Eleventh Circuit was absolutely correct in deciding that this particular contract authorized conduct which violates both DIDMCA and the Regulations and therefore did not qualify for protection under DIDMCA. However, in Division 2 of the panel opinion, reinstated *en banc*, the Eleventh Circuit held that to qualify for federal preemption under DIDMCA, the financing agreement need not contain an express term guaranteeing the debtor thirty days notice before repossession or foreclosure. This Cross-Petition for certiorari will show that holding effectively prevents the consumers from having the consumer benefits mandated by Congress in DIDMCA, § 501(c)(2).

The Quillers filed this Cross-Petition in order to preserve their right to urge this error in the event this Court grants BarclaysAmerican's Petition for Certiorari.

THE REASONS FOR GRANTING A WRIT OF CERTIORARI UPON THIS CROSS-PETITION

A. Division 2 Of The Panel Opinion Of The United States Court Of Appeals For The Eleventh Circuit Gives A Mobile Home Finance Company The Right To Claim Federal Preemption Of An Established State Maximum Rate Of Finance Charge On The Financing Of A Mobile Home Even Though Its Contract With The Consumer Denies Those Concomitant Consumer Benefits Mandated By Congress In DIDMCA.

The opinion of the Eleventh Circuit in this case contains an inherent contradiction. On one hand, the Court held

"that Congress included manufactured home financing in its preemption scheme *only* on the condition that consumer-debtors would be *guaranteed* certain safeguards," and that BarclaysAmerican "may not claim the benefits of the federal law while at the same time failing to provide the *consumer protections* that are the *price* of those benefits." *Quiller v. BarclaysAmerican Credit, Inc.*, 727 F.2d 1067, 1071 (11th Cir. 1984). (Emphasis added.) This is consistent with the language of DIDMCA § 501(c) that it shall not apply "unless the terms and conditions relating to such loan . . . comply with consumer protection provisions . . ."

On the other hand, the Court agreed with Barclays-American and the office of General Counsel of the Federal Home Loan Bank Board ("FHLBB") that in order to qualify for federal preemption "the financing agreement need not contain an express term *guaranteeing* the debtor thirty days notice before repossession or foreclosure." (Emphasis added.) *Id.*, p. 1071. But there is no right, and no guarantee of a right, unless the right is such that it can be enforced in a court by the consumer. A right which is unenforceable is no right.

There is no right to notice to cure default or to notice prior to repossession unless those rights are stated in the contract. The general rule of American law is that the right to repossess is absolute once default has occurred and the secured party may immediately repossess without notice—UNLESS OTHERWISE PROVIDED IN THE CONTRACT. If it is not in the contract, there is no right to notice prior to repossession. 75 A.L.R. 3rd 1061, et seq. (1977); 29 A.L.R. Fed. 418, et seq. (1977); Uniform Laws Annotated, Uniform Commercial Code, Master Edition, 9-503, Note 8; 69 Am Jur 2d, Secured Transactions, § 598.

Georgia follows that general rule. *Ford Motor Credit Company v. Hunt*, 241 Ga. 342, 245 S.E.2d 295 (1978). That

case held there was no cause of action for wrongful repossession without notice because there was no right to notice in the contract. The Quiller contract contains language almost identical to that in *Ford Motor Credit Company v. Hunt*, *supra*.

In *Quiller*, the language, in addition to that quoted by the Eleventh Circuit, contained the following: "Upon default, Holder shall have all of the remedies of a secured party under the Uniform Commercial Code." (727 F.2d at 1071-1072). In *Ford Motor Credit Company, v. Hunt*, *supra*, the language was: "Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable and seller shall have all the rights and remedies of a secured party under the Uniform Commercial Code including the right to repossess the property . . ."

Assume that the Quillers attempted to enforce their alleged right, to a thirty-day notice of default and to cure in any court in Georgia, state or federal. It is absolutely certain that the state court, and the district court applying state law, would grant the lender's motion for summary judgment or directed verdict. The same result would happen in almost all the other states that have adopted the UCC.

Counsel for FHLBB take the position, in their briefs in the Eleventh Circuit, that general counsel for FHLBB made a clear decision that the right to the thirty-day notice of default and to cure does not have to be recited in the contract. The argument is then made that the decision of the general counsel for FHLBB must be given such deference by the Courts as to make that decision binding.

Deference to an unofficial opinion of counsel for a federal agency is not equivalent to blind obedience. This Court has explained clearly the interaction between deference to the

interpretation of a federal agency and judicial review. The language applies directly to this case.

In *Securities Industry Association, et al, v. Board of Governors of the Federal Reserve System, et al*, 468 U.S. ____; 82 L.Ed.2d 107 (1984), this Court considered an interpretation of the Federal Reserve Board of a provision of the Banking Act of 1933. The Board has primary responsibility for implementing that act and the Court was requested to give deference to the Board's interpretation of the act. It refused.

This Court pointed out that "we accord substantial deference to the Board's interpretation of that Act whenever its interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent . . . We have also made clear, however, that deference is not o be a device that emasculates the significance of judicial review." Judicial deference to an agency's interpretation of the statute "only sets the framework for judicial analysis; it does not displace it." ". . . A reviewing court" must reject administrative constructions of [a] statute, whether reached by adjudication or by rule making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." 82 L.Ed. 2d at 113. With reference to rationalizations by counsel for the agency, the Court stated:

> We previously have stated that post hoc rationalizations by counsel for agency action are entitled to little deference: 'It is the administrative official and not appellate counsel who possess the expertise that can enlighten and rationalize the search for the meaning and intent of Congress.' . . . As a result, the Board's presentation here of the policies behind the Act as they apply to this case is of less significance than it would be

if it had occurred at the administrative level. 82 L.Ed. 2d at 113-114.

B. Sound Policy Dictates Strict Compliance With DIDMCA So That The Consumers Will In Fact Get The Benefits Mandated By Congress.

Division 2 of the panel opinion of the Eleventh Circuit, in sustaining the position of BarclaysAmerican and the office of General Counsel of the FHLBB, is contrary to the legal concept of a contract. Under that division, whether a contract is within or without the scope of DIDMCA cannot be determined at the time of execution by reading it. A determination as to whether a contract is within or without the scope of DIDMCA can only be made during the term of the contract and is dependent upon the conduct and actions of the creditor.

Moreover, BarclaysAmerican and the office of General Counsel of the FHLBB take the position that contract language is irrelevant. Language reserving to the creditor rights, inconsistent with DIDMCA and the implementing regulations, is irrelevant. Whether the contract is within or without the scope of DIDMCA is not determined at the time the contract is executed and delivered, but later during the term of the contract and determination is made depending upon the conduct and actions of the creditor. This is a new method of construing a contract.

The practical effect of Division 2 of the Eleventh Circuit's holding is that the finance company can have an option, not disclosed in the contract, during the term of the contract, to come within or without the scope of DIDMCA—and still charge a finance charge above the level permitted by state law. As there is no way to tell in advance whether the contract was within or without the scope of DIDMCA, the finance company is permitted to make its election—in or

out—later depending on the circumstances and what would be to its advantage.

With such an undisclosed option, what would the understanding of the parties be? How could that be a contract with mutuality? How would that square with the concept of a contract being an understanding between two parties to do or not do a specific thing?

It is submitted that the informal opinion of the office of General Counsel of the FHLBB, that the right to a thirty-day notice need not be set out in the contract, is demonstrably irrational. If the consumer is to have the rights mandated by Congress, then he must be able to enforce them in a court.

CONCLUSION

For the reasons set forth in the within Cross-Petition, if this Court grants BarclaysAmerican's Petition for Writ of Certiorari, this Court should grant this Cross-Petition for the writ of certiorari to review Division 2 of the panel judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

JAY M. SAWILOWSKY
Counsel of Record
902 Georgia Railroad Bank Building
Augusta, Georgia 30901
(404) 722-8853

JOHN B. LONG
NIXON, YOW, WALLER & CAPERS
1500 Georgia Railroad Bank Building
Augusta, Georgia 30901
(404) 722-7541

APPENDIX

APPENDIX A

BARCLAYSAMERICAN/CREDIT, INC.,
Cross-Petitioners,

v.

ARTHUR QUILLER AND LILLIE MAE QUILLER,
and All Other Persons Similarly Situated,
Respondents.

No. 85-____

OCGA § 11-9-503 and UCC § 9-503. Secured party's right to take possession after default.

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Code Section 11-9-504. (Code 1933, § 109A-9-503, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1978, p. 1081, § 1.)

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Cross-Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI

Of Counsel:
ROGER B. HENDRIX
General Counsel
WALLACE C. TYSER, JR.
Assistant General Counsel
WILLIAM B. WEBB, JR.
Senior Corporate Counsel
BARCLAYSAMERICAN
CORPORATION
201 South Tryon Street
P.O. Box 31488
Charlotte, N.C. 28231
(704) 372-0060

DOUGLAS N. CAMPBELL, ESQ.
Counsel of Record
LAURA E. STEVENSON, ESQ.
MITCHELL, LOGGINS,
CAMPBELL & ELSBERRY
Suite 950, The Equitable
Building
100 Peachtree Street
Atlanta, Georgia 30303
(404) 658-1400

Attorneys for Petitioner

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QUESTION PRESENTED

Whether the absence of a contractual term requiring the giving of the 30-day notice results in the debtor's having no enforceable right to receive the 30-day notice prior to foreclosure, repossession or acceleration even though such a requirement is specifically imposed by DIDMCA and 12 C.F.R. § 590.4(h)?

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI
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FOR THE ELEVENTH CIRCUIT

BRIEF IN RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI

BarclaysAmerican/Credit, Inc. [hereinafter "BarclaysAmerican"], the Cross-Respondent herein, respectfully prays that this Court deny the Respondents' Cross-Petition For Writ of Certiorari.

Opinions Below

BarclaysAmerican incorporates herein its statement of the Opinions Below in its Petition For Writ Of Certiorari filed in Case No. 85-541.

Jurisdiction

BarclaysAmerican incorporates herein its statement of the Jurisdiction in its Petition For Writ Of Certiorari filed in Case No. 85-541.

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1. Cross-Respondent's parent corporations in reverse order are BarclaysAmericanCorporation, Barclays U.S. Holdings Inc., Barclays USA Inc., Barclays Bank PLC and Barclays PLC. Cross-Respondent's successor by merger is BarclaysAmerican/Financial, Inc.

The Respondents' Cross-Petition For Writ Of Certiorari was received by BarclaysAmerican's Counsel of Record, Douglas N. Campbell, Esq., on October 29, 1985. This Brief In Response To Cross-Petition For Certiorari is presented for filing within 30 days of the receipt of the Cross-Petition For Writ Of Certiorari pursuant to Rules 22 and 28.2 of this Court.

Statutory Provisions And Regulations Involved

BarclaysAmerican incorporates herein its statement of the Statutory Provisions And Regulations Involved in its Petition For Writ Of Certiorari filed in Case No. 85-541.

Statement Of The Case

BarclaysAmerican incorporates herein its statement of the Statement Of The Case in its Petition For Writ Of Certiorari filed in Case No. 85-541.

REASONS FOR GRANTING THE CROSS-PETITION FOR WRIT OF CERTIORARI

I. This Court Should Grant Both The Petition And Cross-Petition For Writ of Certiorari.

This Court should grant the Cross-Petition For Writ Of Certiorari filed by the Quillers in this case — not because this Court should reverse the first holding of the Eleventh Circuit that the 30-day notice is not required to be disclosed in the sales contract under § 501 of the Depository Institutions Deregulation And Monetary Control Act of 1980, Pub. L. No. 96-221, Title V, § 501, 94 Stat. 161 (March 31, 1980), codified at 12 U.S.C. § 1735f-7 note [hereinafter "DIDMCA" and "the Federal Preemption Statute"] and 12 C.F.R. § 590.4(h), and not because of the reasons stated by the Quillers in their Cross-Petition. Rather, this Court should grant *certiorari* because neither side is satisfied with the result below, and creditors, consumers, the courts and the Federal Home Loan Bank Board [hereinafter the "FHLBB" and the "Board"] are all confused as to what the Eleventh Circuit majority's opinion really means.

On the one hand, the Quillers are not satisfied because they apparently would prefer that the broadest possible construction be given to DIDMCA and the regulations so as to require that the right to the 30-day notice *must* be contained in the sales contract itself. This construction would provide the easiest theory for future plaintiff-debtors to proceed under and, in all likelihood, would increase the number of sales contracts which would violate the purported requirement, thereby increasing the potential number of lawsuits which may be filed. For example, since the filing of BarclaysAmerican's Petition For Writ of Certiorari, one of the same lawyers representing the Quillers in this case has filed yet another class action based on similar allegations of violations of DIDMCA and the regulations.[2] Thus, it is apparent that debtors will continue to bring actions against creditors until it is made clear that the 30-day notice provision need not be contained in the contract and that 12 C.F.R. § 590.4(h) can only be violated by failure actually to give the prescribed notice upon the debtor's default at least 30 days before taking any action to repossess, accelerate or foreclose.

On the other hand, BarclaysAmerican is not satisfied with the second holding of the Eleventh Circuit. As stated in BarclaysAmerican's Petition For Writ Of Certiorari, the initial holding is the correct construction of DIDMCA § 501(c)(2) and 12 C.F.R. § 590.4(h) and is consistent with the views of the General Counsel of the FHLBB as expressed in the October 28, 1982, opinion letter issued by the

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2. *Dinkins v. First Carolina Finance Corporation*, Case No. CV185-241, United States District Court for the Southern District of Georgia, Augusta Division, was filed on October 15, 1985. Actually, two of the three co-counsel for the plaintiff in the *Dinkins* case are also co-counsel in this case and in the companion case, *Grant v. General Electric Credit Corporation*, on Petition For Writ Of Certiorari to the United States Court of Appeals for the Eleventh Circuit, Case No. 85-584. The *Dinkins* case makes a total of eight class actions pending against six different creditors involving a number of common issues of law and fact, including the principal issue in involved in BarclaysAmerican's petition.

FHLBB's General Counsel, Thomas P. Vartanian, 5 Fed. Banking L. Rep. (CCH) ¶83,027 (1983) [hereinafter the "Vartanian Letter"]. Appendix J[3] However, the Eleventh Circuit panel majority and a 6-5 majority of the Eleventh Circuit sitting *en banc* went astray by failing to stop at that point. Instead, the Eleventh Circuit created a rule of construction under which a sales contract must be examined to determine whether it contains a term "authorizing conduct *contrary* to the [preemption] statute or regulations," thereby losing preemptive status. *Quiller et al. v. BarclaysAmerican/Credit, Inc.*, 727 F.2d 1067, 1072 (11th Cir. 1984). Appendix B at B-7 (emphasis original).

II. A Statutorily Required Action, Such As The Giving Of A 30-day Notice By The Creditor Prior To Foreclosure, Does Not Have To Be Expressly Contained In The Sales Contract In Order For The Debtor To Acquire An Enforceable Right To Receive The 30-Day Notice.

— In their perhaps most startling statement in this litigation to date, the Quillers argue that under general rules of American law and Uniform Commercial Code [hereinafter "UCC"] Section 9-503, the debtor's right to receive the 30-day notice under § 501(c) of DIDMCA and 12 C.F.R. § 590.4(h) is unenforceable "UNLESS OTHERWISE PROVIDED IN THE CONTRACT." Cross-Petition For Writ Of Certiorari, p. 4 (emphasis original). The reasoning of the Quillers is, however, fallacious, as the following discussion will demonstrate.

The Quillers argue that under O.C.G.A. § 11-9-503, there is no requirement that a secured party must provide notice prior to repossession of collateral, "[u]nless otherwise agreed." Taken alone, this is a correct statement of the law

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3. Appendix to the Petition For Writ Of Certiorari filed in Case No. 85-541. Citations to portions of a particular appendix will be as follows: "App. ___ at ___.".

under the Georgia UCC. The Quillers then leap to the conclusion that a debtor would have no enforceable right to the 30-day notice required by DIDMCA and 12 C.F.R. § 590.4(h) unless the notice was required by a term in the contract. That conclusion, however, simply does not follow from the Quillers' premise.

O.C.G.A. § 11-9-503 does not address the situation in which another statute or regulation requires such a notice to be given. To argue that § 11-9-503 requires that the 30-day notice must be a contracted term and that a federally required notice provision would be nugatory if the parties did not contract therefor is really to argue the astonishing proposition that O.C.G.A. § 11-9-503 (1962) prospectively preempts DIDMCA (1983) and 12 C.F.R. § 590.4(h) with regard to the issue of the 30-day notice. This reasoning is simply incorrect because nothing in O.C.G.A. § 11-9-503 precludes the applicability of a statutorily required notice provision and, in any event, federal law would preempt state law under the Supremacy Clause of the United States Constitution.[4]

In fact, the general rule of law, contrary to the Quillers' assertions, is that the law, including regulations, in effect at the time and place of contracting is incorporated into the contract as if the law were expressly referred to in the contract's terms. *Maryland-National Capital Park and Planning Commission v. Lynn*, 514 F.2d 829 (D.C. Cir. 1975); *Rehart v. Clark*, 448 F.2d 170 (9th Cir. 1971); *Dorsey v. Clements*, 202 Ga. 820, 44 S.E.2d 783 (1947). There are numerous examples in Georgia of statutorily required notice provisions which operate independently of the contracts

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4. The Quillers' citations to additional authorities in their Cross-Petition do not support their argument. 75 A.L.R. 3rd 1061 (1977) and 29 A.L.R. Fed. 418 address the constitutionality of the self-help repossession provision of Section 9-503 of the UCC and do not consider the impact of another applicable statute. 69 Am. Jur. 2d., Secured Transactions, § 598, does not discuss the impact of another statute on UCC § 9-503.

which they may affect and which do not have to be contained in the contract in order for a debtor to acquire an enforceable right to the notice. *E.g.*, O.C.G.A. § 11-9-504(3) (requires that after repossession of the collateral, notice of any public sale, private sale or other intended disposition must be made); O.C.G.A. § 11-9-505 (if the debtor has paid less than 40% of the cash price and the secured party proposes to retain the collateral in satisfaction of the obligation, written notice of such proposal must be sent to the debtor); O.C.G.A. § 10-1-36 (a notice of the creditor's intention to pursue a deficiency claim must be sent to the debtor ten days after repossession in order to recover a deficiency judgment under the GMVSFA); and O.C.G.A. § 44-14-162.2 (requires a fifteen days notice prior to foreclosure of a real property security deed). There are numerous cases enforcing these notice provisions, and we find not a single one where a contract provision affirming the right to notice was a factor in the decision. More importantly, we do not find a single case where it was argued, seriously or not, that the absence of such a contract provision "took away" the right to notice which the legislature had bestowed. The Quillers' view, if adopted, would represent a radical change in American jurisprudence on this subject which is totally unwarranted.

In the case cited by the Quillers, *Ford Motor Credit Co. v. Hunt*, 241 Ga. 342, 245 S.E.2d 295 (1978), the Georgia Supreme Court was presented with the narrow issue of whether the debtor was entitled to notice upon acceleration and foreclosure in the absence of a term in the contract requiring the notice. The Court of Appeals had twice before found that, under the terms of the Georgia Motor Vehicle Sales Finance Act [hereinafter "GMVSFA"] sales contract under consideration, notice to the debtor prior to repossession was required, not statutorily, but because of certain language in the contract. The Supreme Court disagreed, holding that, strictly as a matter of contractual construction, "the seller had not contracted away the right *under law, to repossess without first giving notice.*" 245 S.E.2d at

296 (emphasis original). No statutorily required repossession notice provision was discussed by the *Hunt* court and apparently none applied. Thus, the *Hunt* case is limited to the situation in which no statute, state or federal, imposes a duty of notice prior to repossession upon the creditor and simply holds that, under O.C.G.A. § 11-9-503, if no notice was contracted for, none is required to be given.

Finally, the Quillers argue that the FHLBB's *amicus curiae* briefs are merely "*post hoc* rationalizations" and should not be considered by this Court. BarclaysAmerican has responded to this argument in its Brief In Reply To Respondents' Opposition To Petition For Writ of Certiorari at Section III and simply incorporates that discussion herein. In their Cross-Petition, the Quillers place additional reliance for this proposition on *Securities Industry Association v. Board of Governors*, 468 U.S. ___, 82 L.Ed.2d 107 (1984), in arguing that the Vartanian Letter is also a "*post hoc* rationalization." That case involved a change in the position of the Federal Reserve Board's general counsel at the trial of the case. However, the Vartanian Letter was issued by the FHLBB's General Counsel approximately four months before the Quillers filed suit in this case and the FHLBB *adopted* his position in the Eleventh Circuit; therefore, *Securities Industry Association* has no application here.

The Quillers contend that the 30-day notice provision and all other requirements under the regulations must be contained in the contract in order to make the creditor "choose" to proceed under DIDMCA at the time the sales contract is executed. Regardless of whether DIDMCA imposes such a requirement, the Quiller sales contract clearly specifies in the lower left-hand corner of the front and back page thereof that it is a "FEDERAL PREEMPTION CONTRACT" and contains everything that the regulations require. BarclaysAmerican's Petition For Writ Of Certiorari, p. 4 and Appendix I, filed in Case No. 85-541.

In summary, the Quillers' argument that the 30-day notice is a "contract for" requirement, BarclaysAmerican's

Petition For Writ Of Certiorari, p. 20, is logically unsupportable and, further, is not required by DIDMCA or 12 C.F.R. § 590.4(h).

III. Conclusion

In conclusion, BarclaysAmerican/Credit, Inc. respectfully requests that this Court grant BarclaysAmerican's Petition For Writ Of Certiorari and does not oppose the grant of the Quillers' Cross-Petition For Writ Of Certiorari in this case for the purposes and reasons set forth above and in its other briefs in Case No. 85-541.

Respectfully submitted,

MITCHELL, LOGGINS,
CAMPBELL & ELSBERRY
Douglas N. Campbell
Counsel Of Record
Laura E. Stevenson
Counsel for Petitioner

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No. 85-717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARTHUR QUILLER, LILLIE MAE QUILLER,
and all other Persons Similarly Situated,
Cross-Petitioners,

VS.

BARCLAYSAMERICAN/CREDIT, INC.,
Cross-Respondent.

On Cross-Petition for Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

CROSS-PETITIONERS' REPLY TO CROSS-RESPONDENT'S RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI

JAY M. SAWILOWSKY
Counsel of Record
Georgia Railroad Bank Building
Augusta, GA 30901
(404) 722-8853

JOHN B. LONG
NIXON, YOW, WALLER & CAPERS
1500 Georgia Railroad Bank Building
Augusta, GA 30910
(404) 722-7541

Attorneys for Cross-Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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ARTHUR QUILLER, LILLIE MAE QUILLER
and all Other Persons Similarly Situated,
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VS.

BARCLAYSAMERICAN/CREDIT, INC.,
Cross-Respondent.

On Cross-Petition for Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

---

CROSS-PETITIONERS' REPLY TO CROSS-RESPONDENT'S RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI

I. The Inconsistent Positions Now Being Advanced by BarclaysAmerican Demand a Response.

In BarclaysAmerican's response to the Quillers Cross-Petition for Writ of Certiorari, BarclaysAmerican requests on page 1 that this Court "deny" the Cross-Petition for Writ of Certiorari. However, on page 2 of that response, Bar-

claysAmerican argues that this Court should grant both the Petition and Cross-Petition for Writ of Certiorari. These inconsistent positions are reminiscent of the inconsistent positions initially taken by BarclaysAmerican that the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA") was unconstitutional and that the law of South Carolina controls the validity of the Quillers' contract.[1]

The Cross-Petition filed by the Quillers is a cross-petition that has been filed pursuant to Rule 19.5 of this Court, and review is sought only if BarclaysAmerican's Petition for Writ of Certiorari is granted. See *Fea v. Algonquin Sng., Inc.*, 426 U.S. 548 (1976) at 560, note 11.

II. BarclaysAmerican has Made Statements Inconsistent with the Economic Impact Arguments that it is now Advancing before this Court.

BarclaysAmerican argues that to require that the "terms and conditions" of a credit sale contract grant to a mobile home purchaser the right to a notice of default and the right to thirty (30) days in which to cure that default prior to repossession, acceleration or foreclosure will create a flood of litigation.[2] Even though the panel opinion in *Quiller v. BarclaysAmerican/Credit, Inc.*, 727 F.2d 1067 (11th Cir. 1984), was first published on March 19, 1984, there just has not been a flood of litigation. The reason for that is that a

[1]See the *Quiller* Brief in Opposition to Petition for Writ of Certiorari in Case No. 85-541, Appendix B, pp.8a-9a.

[2]The case of *Dinkins v. First Carolina Finance Corp.*, CV 185-241 in the United States District Court for the Southern District of Georgia and referred to by BarclaysAmerican, involves a contract in which the finance company reserved for itself the right upon default to declare the unpaid installments "to be immediately due and payable." Furthermore, the finance company upon default reserved the right to "take immediate possession of the property, without demand, and without process . . ."

substantial number of banks, savings & loan associations and finance companies elected to continue to be governed by state law and others who wished to pay the price for preemption entered into contracts which included as "terms and conditions" provisions that were consistent with DIDMCA, § 501(c) and the consumer protection regulations set forth at 12 C.F.R. § 590.4.[3]

BarclaysAmerican's "flood gate" arguments are being made in order to buttress its position taken in its Petition for Writ of Certiorari that the potential *ad damnum* in the pending cases is in the hundreds of millions of dollars and that the monetary damages to creditors, including itself, will be "horrendous" and "mind boggling" (see BarclaysAmerican's Petition for Writ of Certiorari, pages 8, 29). Barclays American has made these same economic impact arguments before the United States Senate in its lobbying efforts to amend DIDMCA to allow it to now amend its contracts unilaterally.[4] While BarclaysAmerican makes

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[3]In 1980, the Georgia General Assembly responded to high interest rates by temporarily increasing the maximum time-price differential that could be charged on a new motor vehicle or mobile home from an 8% add-on rate to a 10% add-on rate. Ga. Laws 1980, p.523, amending O.C.G.A. § 10-1-33(a). This increase was made permanent in 1981. Ga. Laws 1981, p.703. A 10% add-on rate over a 15-year period equates to a rate equivalent to a simple interest rate of approximately 14%. The average long-term conventional home loan rate during 1980 was 12.3%, during 1981 was 14.1%, during 1982 was 14.5% and during 1983 was 12.1%. 1985 Statistical Abstract of the U.S., 105th Ed., U.S. Dept. of Commerce, Bureau of the Census.

[4]A draft of the proposed amendment to DIDMCA being urged by BarclaysAmerican is SLC Draft No. 089910.415. A hearing on this amendment was held before the Senate Subcommittee on Financial Institutions and Consumer Affairs on November 6, 1985. The *Columbus Enquirer*, Nov. 7, 1985, p.B-1. BarclaysAmerican now seeks an amendment which will allow it to continue to receive the highest long-

these economic impact arguments to this Court and to Congress, it has informed the Securities and Exchange Commission that the *Quiller* decision is not "material."[5] If this case has the "economic impact" which BarclaysAmerican has argued, then it would be considered "material" for purposes of reporting. *See S.E.C. v. Falstaff Brewing Corp.*, 629 F.2d 62 (D.C. 1980) at 70-73.

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term finance charges ever charged in connection with mobile home financing while granting it a pardon for previous violations of Georgia law. BarclaysAmerican obviously does not want this Court to decide the issues in this case and has utilized the time during which the mandate of the Eleventh Circuit has been stayed to continue to collect excessive finance charges from mobile home purchasers while seeking a legislative pardon for its failure to pay the price for preemption. The legislative pardon that BarclaysAmerican now seeks, if granted, will do nothing but create constitutional issues that are not now present. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

[5]While class action discovery in the *Quiller* case had not been completed prior to the District Court dismissing that action, discovery did reveal that there was 775 transactions that are the subject matter of this class action (R-1, p.179,¶ 3, Vol.2, p.433). The panel opinion of the Eleventh Circuit was rendered on March 19, 1984, and the *en banc* opinion was rendered by the Eleventh Circuit on July 8, 1985. The annual report of BarclaysAmerican Corporation, Form 10-K for the fiscal year ending December 31, 1984, revealed that the company did not consider any litigation to be "material" with respect to the assets of the business of the company as a whole. See Barclays American's Form 10-K filed with the Securities and Exchange Commission for the fiscal year ending December 31, 1984, p.10, Item 3, Commission File No. 1-7870. The Form 10-Q filed by BarclaysAmerican Corporation for the quarter ending September 30, 1985, is dated November 13, 1985 and reveals no such "material" litigation.

III. DIDMCA Requires that Preemption Contracts Contain Certain Consumer Safeguards Not Required in Non-preemption Contracts.

In enacting DIDMCA, 12 U.S.C. § 1735(f)-7(note), Congress could easily have enacted a short statute which preempted all state laws regulating the time-price differential on mobile home contracts or loans and nothing more. However, the preemption method chosen by Congress was not "absolute." DIDMCA, § 501(c), makes that clear by indicating that credit sales would not be preempted "unless the terms and conditions relating to such . . . credit sale . . . comply with the consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board (hereafter "FHLBB"). While Congress delegated substantial authority to the FHLBB, Congress mandated that consumers would be granted a "30 day notice prior to instituting any action leading to repossession or foreclosure." DIDMCA, § 501(c)(2). In proposing regulations, there was no question but that the contractual provisions of the agreements had to comply with the regulations. 45 Fed. Reg. 31122 (May 12, 1980); 45 Fed. Reg. 43681 (June 30, 1980). Mobile home finance companies had to make a choice at the time of the transaction and that choice could not be made by reserving in their forms all of the onerous rights permitted by state law while at the same time seeking the benefits permitted by federal law.

BarclaysAmerican refers to various Georgia statutes in support of its contention that the right to a notice of default and the right to cure a default within 30 days do not have to be contained in the contracts. O.C.G.A. § 44-14-162.2, dealing with non-judicial foreclosures of real estate in Georgia, is a statute involving *procedure*, governing the non-judicial foreclosure of deeds to secure a debt in Georgia. See, O.C.G.A. § 44-14-162.3(b). The power of sale which it regu-

lates is part of a party's contractual undertaking. *See Roberts v. Cameron-Brown Co.*, 556 F.2d 356 (5th Cir. 1977) at 359. Likewise, O.C.G.A. § 11-9-504(3), O.C.G.A. § 11-9-505 and O.C.G.A. § 10-1-36 merely govern *procedure* in connection with the disposition of collateral *after* repossession or the prerequisites for obtaining a deficiency judgment. Under Georgia law, notice of default and 30 days in which to cure a default in connection with preemption contracts simply is not a prerequisite to a finance company being able to take possession of the consumer's home, either by repossession or foreclosure, or to accelerate the unpaid balance unless the "terms and conditions" of the contract so provide. DIDMCA does not grant to the consumer any rights. The consumer is granted rights in the contract if the finance company elects to preempt state law and come within the scope of DIDMCA. The Georgia procedural statutes do not in any way limit the creditor's rights under his contract to repossess, foreclose or accelerate; they merely regulate procedure.

If BarclaysAmerican's position were meritorious, mobile home finance companies would not have to make an election at the time of the contract but would be free to either argue at a later date that the contract was a "preemption contract," a contract governed by "South Carolina law," or a contract governed by "Georgia law," whatever was most beneficial to the creditor at the time, much like BarclaysAmerican has done in this case. If so, the language contained in DIDMCA, § 501(c), would be meaningless.

BarclaysAmerican has stated that at the bottom left hand corner it referred to its contract as being a "preemption" contract. Labels chosen by the drafter of a contract do not control; rather, the "terms and conditions" show the intent of the parties. *American Standard Credit, Inc. v. National Cement Co.*, 643 F.2d 248 (5th Cir. 1981); *Citizens & South-*

ern Equipment Leasing, Inc. v. Atlanta Federal Savings & Loan Assn., 144 Ga.App. 800, 243 S.E.2d 243 (1978); *Fagelson v. Pfister Aluminum Corporation*, 109 Ga.App. 663, 137 S.E.2d 313 (1964); and *Suggs v. Brotherhood of Locomotive Firemen & Enginemen*, 106 Ga.App. 563, 127 S.E.2d 827 (1962).

BarclaysAmerican was not in a vacuum when it chose the wording of its contract of adhesion. A creditor's "right to repossess the collateral is the secured creditor's ultimate weapon against a defaulting debtor; in some instances the threat of repossession alone will be sufficient to persuade a misguided debtor to mend his ways ('If you don't pay up, I'll exercise my right to repossess your favorite hunting dog in whom I have a security interest')." White & Summers, *Uniform Commercial Code*, 2d Ed., § 26-5, p.1095 (West Publishing Company, 1979)." The language chosen by BarclaysAmerican allowed it to do just that and, in the case of the Quillers, the actions of BarclaysAmerican were inconsistent with any notice of default set forth in 12 C.F.R. § 590.4(h) and inconsistent with the right to cure within thirty (30) days set forth in DIDMCA, § 501(c)(2).

CONCLUSION

The Quillers have filed a Cross-Petition for Writ of Certiorari in order to preserve their right to argue that the "terms and conditions" of the credit sale contract have to grant a right to a notice of default and a right to thirty (30) days in which to cure the default if Georgia law is to be preempted. As BarclaysAmerican cannot recover under any theory that it has advanced before this Court and the granting of a petition for writ of certiorari in this case will allow BarclaysAmerican to have unfettered control over repossessions, foreclosures and accelerations against mobile home purchasers in Georgia, Cross-Petitioners re-

spectfully request that Barclays American's Petition for Certiorari be denied; however, if granted, Cross-Petitioners request that this Cross-Petition be granted.

Respectfully submitted,

JAY M. SAWILOWSKY
Georgia Railroad Bank Bldg.
Augusta, GA 30901
(404) 722-8853

JOHN B. LONG
Of Counsel:
NIXON, YOW, WALLER & CAPERS
1500 Georgia Railroad Bank Bldg.
Augusta, GA 30910

(6) (4) 2

Nos. 85-541, 85-584 and 85-717

In the Supreme Court of the United States

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OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC., PETITIONER

v.

ARTHUR QUILLER, ET AL.

JACK GRANT, JR., ET AL., PETITIONERS

v.

GENERAL ELECTRIC CREDIT CORPORATION

ARTHUR QUILLER, ET AL., PETITIONERS

v.

BARCLAYSAMERICAN/CREDIT, INC.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

JAMES M. SPEARS
Deputy Assistant Attorney General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
BRUCE G. FORREST
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

A provision of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 501, 94 Stat. 161-163, 12 U.S.C. 1735f-7 note, preempts the application of state usury laws to loans secured by first liens on residences, including mobile homes. With respect to mobile home loans, the preemption provision applies only to loans that "comply with [the] consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board" (§ 501(c)), which provide, inter alia, that the lender may take no action to exercise certain remedies upon a default without giving the borrower 30 days' notice and opportunity to cure. The court of appeals ruled that the loan contract in Nos. 85-541 and 85-717 contained language inconsistent with the borrower's rights under this provision and that preemption was therefore inapplicable and the Georgia usury law was applicable to this loan. The question presented is:

> Whether the court of appeals misread the Act and the Bank Board's regulations when it concluded that federal preemption of state usury laws is inapplicable to a loan contract that contains language inconsistent with the borrower's federal law right to notice and opportunity to cure defaults.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-541

BARCLAYSAMERICAN/CREDIT, INC., PETITIONER

v.

ARTHUR QUILLER, ET AL.

No. 85-584

JACK GRANT, JR., ET AL., PETITIONERS

v.

GENERAL ELECTRIC CREDIT CORPORATION

No. 85-717

ARTHUR QUILLER, ET AL., PETITIONERS

v.

BARCLAYSAMERICAN/CREDIT, INC.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), Pub. L. No. 96-221, § 501, 94 Stat. 161-163, 12 U.S.C. 1735f-7 note, was designed to attack two primary causes of a severe shortage of mortgage credit. DIDMCA provided for

phased removal of federal interest rate restrictions on deposits in federally insured financial institutions, permitting such institutions to offer competitive rates and thereby enhance the resources available for mortgage loans. See S. Rep. 96-368, 96th Cong., 2d Sess. 3-4 (1979). DIDMCA also provided for preemption of state usury limits on residential mortgage loans, permitting such institutions to charge sufficient rates to induce mortgage lending under then-prevailing conditions. § 501(a)(1), 94 Stat. 161; see S. Rep. 96-368, *supra*, at 19.[1]

Under Section 501(c) of DIDMCA (94 Stat. 162) federal preemption of state usury laws with respect to loans secured by "residential manufactured homes" (primarily mobile homes) is conditioned on compliance with certain borrower-protection requirements promulgated by the Federal Home Loan Bank Board (Bank Board):

> The provisions of subsection (a)(1) [the preemption section] shall not apply to a loan, mortgage, credit sale, or advance which is secured by a first lien on a residential manufactured home unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with [the] consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board. Such regulations shall—
>
> (1) include consumer protection provisions with respect to balloon payments, prepayment penalties, late charges, and deferral fees;

[1] Section 501(a)(1)(C)(iii) and (vi) (94 Stat. 161) adopts, with appropriate modification, the definitions of "federally related mortgage loan" and "lender" contained in Section 527(b) of the National Housing Act, 12 U.S.C. 1735f-5(b). Thus, DIDMCA's preemption extends to loans made by institutions regulated or insured by an agency of the federal government, or by any creditor, as defined in 15 U.S.C. 1602(f), "who makes or invests in residential real estate loans aggregating more than $1,000,000 per year." 12 U.S.C. 1735f-5(b)(2)(A) and (D). See 12 C.F.R. 590.2.

(2) require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances);

(3) require that upon prepayment in full, the debtor shall be entitled to a refund of the unearned portion of the precomputed finance charge * * *; and

(4) include such other provisions as the Federal Home Loan Bank Board may prescribe after a finding that additional protections are required.

2. Pursuant to Section 501(c) (94 Stat. 162), the Bank Board issued regulations (codified at 12 C.F.R. 590.4) governing mortgage loans secured by manufactured housing where the lender charges an interest rate that exceeds the state usury limit. As required by Section 501(c)(1) (94 Stat. 163) the regulations require that each loan contract contain certain provisions with respect to balloon payments, prepayment penalties, late charges, and deferral fees (12 C.F.R. 590.4(d), (e), (f) and (g), respectively). As required by Section 501(c)(2) (94 Stat. 163) the regulations also provide that, subject to certain exceptions, the creditor may not exercise certain remedies in the event of default unless it has given the borrower 30 days' notice (12 C.F.R. 590.4(h)(1)):

Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against any debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. Such notice shall be sent by registered or certified mail with return receipt requested. In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days

> of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as described above. The debtor is not entitled to notice of default more than twice in any one-year period.

The regulations do not require this provision to be recited in the loan contract.

3. The two cases that are the subjects of the three petitions before this Court arose from the purchase of two mobile homes in Georgia.

Nos. 85-541 and 85-717: Arthur and Lillie Mae Quiller, residents of South Carolina, purchased a mobile home in Georgia in June 1981. The price was $19,754.80 (Pet. App.11).[2] They made a cash down payment of $4,193.80 and financed the balance of $15,561 at an annual interest rate of 18.5% (*ibid.*).[3] The loan agreement is printed on a single sheet of paper labeled "(Mobile Home Only) FEDERAL PREEMPTION CONTRACT." The front of the contract, which contains the signatures and the terms specific to the transaction, recites the disclosures required by the Board's regulations. The front of the contract also contains the following language with respect to defaults (Pet. App. 12 (emphasis added)):

> DELINQUENCY CHARGE. If an installment is in default 15 days or more, the Holder may charge and collect a delinquency charge not to exceed 5% of the installment or $5, whichever is less. Upon such delinquency, Holder may, *subject to any notice of right to*

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[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 85-541.

[3] Total finance charges over the fifteen-year contract life were $31,417.40, or $7,417.40 more than would have been permitted (in the absence of federal preemption) under Georgia's statutory 10% usury limit (Pet. App. 11; 85-541 Br. in Opp. 3).

> *cure*, accelerate the unpaid balance of the contract, in which event the unpaid balance, less the rebate of * * * any unearned insurance premiums included in this transaction, is due and payable. In connection with such delinquency, acceleration, or any repossession, Holder may collect reasonable attorney's fees (15% if not prohibited by law), if referred to an attorney not a salaried employee of Holder, and court costs.

The back of the contract contains several standardized terms, including the following (Pet. App. 13 (emphasis added)):

> Time is of the essence. Holder may collect a delinquency and collection charge on each installment in default for 15 days or more in an amount not exceeding 5% of each said installment or $5, whichever is less. If Customer defaults on any obligation under this contract, or if Holder shall consider the indebtedness or the Collateral insecure, the full balance may, upon election of Holder, *without notice, subject to any notice of right to cure*, become due and payable, less the required rebate of the Finance Charge, and rebate of any unearned insurance premiums included in this transaction, together with reasonable attorney's fees (15% if not prohibited by law) if this contract is referred for collection to an attorney, plus court costs.

No. 85-584: Jack and Evelyn Grant, residents of Georgia, purchased a mobile home in Georgia on February 23, 1982 (R. 10).[4] The price was $29,100. They made a cash down payment of $4,300 and financed the balance of $24,800 at an annual interest rate of 20.12%

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[4] "R." refers to the district court record in No. 85-584.

(*ibid.*).[5] The contract contained the following provision with respect to late payments (*ibid.* (emphasis added)):

> In addition to the regular installment, Buyer agrees to pay as a delinquency and collection charge on each installment in default for more than 15 days, 5% of the unpaid amount of such installment, or $5, whichever is less. In the event of Buyer's default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder, less the unearned portion of that part of the *FINANCE CHARGE* designated as the Time Price Differential calculated by Pro-Rata Method *provided that Buyer shall be given notice of right to cure default* before Seller is permitted to exercise that right.

4. Each couple filed suit against its lender, claiming that the interest rate in its contract exceeded the Georgia usury limit of 10%. Both couples alleged that the state-imposed interest cap was not preempted by DIDMCA because, in the words of the Quiller complaint, the contracts failed to "specifically provide for * * * thirty (30)-day notice [prior to instituting any action leading to repossession or foreclosure]" (Pet. App. M3; see R. 5-7). Both couples sought declaratory judgments barring the lenders from collecting any finance charges. In addition, the Quillers sought penalties of $62,834.80 and the Grants sought $115,092.00 (double the total finance charges) for "willful" violations of state law. Each case was filed as a class action on behalf of persons who had financed purchases of mobile homes with the defendant in Georgia at a rate exceeding the state's usury limit and whose contracts

[5] Total finance charges over the fifteen-year contract life were $57,546, or $9,996.99 more than would have been permitted under the Georgia statute in the absence of federal preemption (see 85-584 Pet. 3; R. 10).

"did not specify that the purchasers were entitled to a thirty (30)-day notice prior to instituting any action leading to repossession or foreclosure" (Pet. App. M2; see R. 3-4).

5. The United States District Court for the Southern District of Georgia granted motions to dismiss both complaints for failure to state a claim.[6] Separate appeals in the two cases were heard by the same panel of the United States Court of Appeals for the Eleventh Circuit. A divided panel reversed in both cases.

All members of the panel agreed that neither the statute nor the regulations required that the borrower's federal right to notice be recited in the contract (Pet. App. B5-B7). However, the majority concluded in *Quiller* that if a contract does contain language that "permits the creditor to repossess or foreclose * * * upon default," then DIDMCA is violated and "the creditor cannot claim the benefits of * * * preemption" (*id.* at B7). The majority examined the Quiller contract "through the eyes of the typical consumer" (*ibid.*) and held that certain language on the back of the contract[7] (" 'without notice, subject to any notice of right to cure' ") was contrary to the statute and regulations because it "would, at most, inform the debtor that he *may* have a right to cure, but the law guarantees him an *absolute* right to cure" (*id.* at B8 (emphasis in original)). The court held that therefore the terms and conditions of the loan did not comply with the federal requirements and the loan was not entitled to preemption.

In *Grant*, the same divided panel found that the contractual language at issue in that case (stating that the lenders may declare all installments "immediately" due

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[6] The *Quiller* case was originally filed in state court and was removed to federal court by the defendant. The *Grant* case was filed initially in the federal court as a diversity action.

[7] The court did not mention the language on the front of the contract, *i.e.*, "subject to any notice of right to cure."

and payable " 'provided that Buyer shall be given notice of right to cure default' ") was "directly contrary" to the Act and the Board's regulations (Pet. App. E3 (citation omitted)). Accordingly, as in *Quiller*, the panel reversed the district court's judgment on the pleadings.

6. Both cases were then reheard en banc. By a vote of six to five, the court reinstated without change the panel opinion in *Quiller*, which found a violation of the statute. But in *Grant* the court split eight to three the other way, finding no violation. The majority opinion in *Grant* explained the different results in the two cases by noting that the Grant contract "expressly condition[s]" the right to accelerate upon default "in clear, mandatory terms upon the debtor's receipt of notice of right to cure" (Pet. App. D9). Although, as the court acknowledged, the length of the grace period was not stated in the contract, the majority concluded that the Grant contractual language was "not clearly contrary to the requirements of the statute and regulations" (Pet. App. D2, D4).

Both decisions evoked strong dissents. In *Quiller*, the dissenting judges stated that the contract did not conflict with the Act or the regulations since the right to notice is not "absolute." The dissenting judges also suggested that if the contract misstated the federal requirement "a more equitable remedy might be to invalidate the provisions contrary to federal law and enjoin enforcement of such provisions if necessary to protect the consumer" (Pet. App. A6). In *Grant*, the dissenting judges on the en banc court would have found a violation even though the contract was "not as vague or equivocal as the qualifying clause in the *Quiller* contract" (Pet. App. D11).

DISCUSSION

The court of appeals has misconstrued Section 501(c)(2) of DIDMCA and 12 C.F.R. 590.4(h)(1). Section 501(c)(2) directs the Bank Board to adopt a regulation requiring

creditors to give 30 days' notice under certain circumstances. The Bank Board obeyed this direction: 12 C.F.R 590.4(h)(1) provides that, with certain exceptions, a creditor may not exercise certain remedies under a loan contract enjoying federal preemption unless it has given the borrower 30 days' notice. This regulation is self-enforcing: it does not require that the borrower's federal right to notice be set forth in the contract, and any language in the contract that is inconsistent with the borrower's federal right to notice is invalid and unenforceable. Congress and the Bank Board did not intend, nor is it logical, that such inconsistent language should result in loss of preemption.

The holdings in these cases erroneously cast doubt on the validity of a large amount of manufactured housing credit extended under DIDMCA. The impact will be felt by lender institutions and other present holders of such credit, many of which are federally insured. Moreover, because the doubt is one that cannot be resolved on the face of the instruments but would require judicial construction of each allegedly inconsistent phrase, the approach taken below will introduce unnecessary confusion into the secondary markets for such loans. Accordingly, and although the potential economic impact of these decisions cannot be quantified with precision, we believe that review by this Court is warranted.

1. Congress enacted DIDMCA to remedy the severe shortage of mortgage credit that had resulted from rising interest rates. See. S. Rep. 96-368, *supra,* at 3-4. One of the problems was that depository institutions were inhibited from making mortgage loans in states whose usury laws prevented them from charging a market rate of interest. Congress concluded that a statutory "modification in state usury laws will enhance the stability and viability of our Nation's financial system and is needed to facilitate a national housing policy and the functioning of a national

secondary market in mortgage lending." S. Rep. 96-368, *supra*, at 19.[8] As the Senate report explained (*ibid.*):

> Federal preemption of State usury ceilings would not only promote national home financing objectives but would provide the resources with which savers could be paid more interest on their savings accounts.

Section 501(c) of DIDMCA provides that the preemption provision shall not apply to a loan unless its terms and conditions "comply with consumer protection provisions [to be] specified in regulations" of the Bank Board. The statute contemplates regulations of two types: regulations requiring certain provisions to be set forth in each contract and regulations imposing self-enforcing requirements and prohibitions. Neither type of regulation would create any doubt about the validity of a loan contract that could not be resolved by examining the face of the contract.[9]

Section 501(c)(2) permits the Bank Board to adopt a regulation with respect to notice that is of the self-enforcing type: it provides that the regulations shall "re-

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[8] As a practical matter, prior to DIDMCA borrowers like the plaintiffs found it difficult or impossible to obtain any home financing. See, S. Rep. 96-368, *supra*, at 19; see also 6A A. Corbin, *Corbin on Contracts* § 1498, at 678 (1962) (usury laws "deprive those whose credit is weakest of the opportunity to borrow at all").

For this reason, the court of appeals erred in viewing expanded consumer protection measures as the "price" lenders must pay for the right to charge higher interest rates (Pet. App. B9). The new right of lenders to charge market interest rates benefited both lenders and borrowers by making credit available.

[9] This was important to Congress, which did not want the consumer protection provisions to defeat the primary purpose of making credit more readily available. For example, the conference report states, "before exercising this authority [to prescribe additional protections], the Board should carefully * * * study the implications of each additional requirement, including consideration of the economic impact on creditors and consumers of each requirement." H.R. Conf. Rep. 96-842, 96th Cong., 2d Sess. 79-80 (1980).

quire a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances)." Accordingly, 12 C.F.R. 590.4(h)(1) is a self-enforcing prohibition against acceleration or foreclosure without 30 days' notice except under specified circumstances. The regulation does not require that the right to notice be set forth in the loan contract,[10] and the Board has consistently adhered to the view that the regulation does not require manufactured housing loan agreements to include a provision for 30 days' notice in the event of default. See Pet. App. J1-J2 (opinion of Bank Board's general counsel); *id.* at K1-K8, L1-L9 (Bank Board amicus curiae briefs in court of appeals).

2. The court of appeals recognized that the right to notice need not be set forth in the loan contract (Pet. App. B5 (emphasis in original)):

> The plain language of the regulation prohibits only the *act* of foreclosure or repossession without giving notice. The words "no action . . . may be taken" regulate the conduct of creditors attempting to exercise their rights upon default, not the written financing agreements themselves.

But the court then ruled that if the contract does contain remedies language that a court finds contrary to the borrower's federal right to notice, preemption is lost. The court apparently assumed that the loan contract could "authoriz[e] conduct contrary to" federal law. Pet. App. B7 (emphasis omitted). On that assumption, the court examined the language in each contract to see whether it

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[10] By contrast, the regulations do require certain consumer protection provisions to be set forth in the loan contract. See 12 C.F.R. 590.4(d), (e), (f) and (g). Any failure to comply with these disclosure rules is discernible on the face of the contract and results in loss of preemption.

"authorized" contrary conduct. It concluded that the loan contract in *Quiller* gave the lender rights contrary to the regulations, defeating preemption.

The court of appeals apparently failed to recognize that the Act and the regulations set forth a federal 30-day notice requirement that the lender and borrower have no power to nullify. Obligations "imposed by law, as necessary to the public interests, * * * could not be dispensed with by the agreement of the parties." *Chicago, St. L. & N.O.R.R.* v. *Pullman Southern Car Co.*, 139 U.S. 79, 90 (1891). See *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 19 n.17 (1977); *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685, 692 (1897). Any misstatement in a loan contract is simply unenforceable. As this Court recently stated in *Connolly* v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986), slip op. 12, "[i]f the regulatory statute is otherwise within the powers of Congress * * *, its application may not be defeated by private contractual provisions."

Accordingly, if the loan contract in *Quiller* misstated the borrower's right to notice,[11] the misstatement did not reduce the borrower's rights that arise by force of the regulation if the lender has elected to preempt state usury law. Preemption is not, in this respect, dependent on the language of the contract, and an arguable misstatement of a right the borrowers might have under certain circumstances in the future did not entitle the borrowers to

[11] The court of appeals' conclusion that the Quiller contract purported to authorize conduct contrary to federal law is itself highly questionable. That conclusion was based on the contract's departure from what the court perceived as the statute's "*absolute* right to cure" (Pet. App. B8 (emphasis in original)). As the Bank Board advised the court (Pet. App. E14), however, the notice requirement is not absolute. The Act and the regulations expressly contemplate situations in which notice need not precede the remedies for default (*i.e.*, abandonment, extreme circumstances, or the third default within a year).

the windfall of a reinstatement of the usury statute after they had received the loan they bargained for and the protection of the federal notice requirement.[12]

3. The court of appeals' ruling casts doubt on the enforceability of a large quantity of outstanding manufactured housing loans. Moreover, such doubts cannot be resolved by examining the face of the contracts but will require an assessment in each instance of the risk that a court will later find language in the contract inconsistent with the notice requirement of the federal regulation. (This assessment may, as illustrated by the range of views below, be difficult to make.) The court of appeals' approach would therefore tend to reduce the marketability of all such loans, contrary to the central purpose of DIDMCA to encourage a flow of capital into home loans.

While few loans at rates in excess of state usury limits are being written today, there is a large number of outstanding loans that this en banc decision wrongly places under a cloud. In 1985, the amount of outstanding credit extended for mobile home purchases stood at almost $26 billion. *Domestic Financial Statistics*, 72 Fed. Res. Bull. A40 (1986). Part of that sum is attributable to loans not dependent on federal preemption: loans that preceded DIDMCA; loans made in the 14 states that had no usury

[12] The brief in opposition in No. 85-541 makes several references (at 5-6, 9-11) to conduct that, respondents contend, would divest the lender of the protections of federal preemption without regard to the contractual language. The complaint makes no such claim, however, and is directed exclusively to the language of the loan agreement. Accordingly, respondents' contentions of unlawful conduct have no bearing on the issue before this Court. The district court proceedings in this case terminated when the lender's motion to dismiss the complaint for failure to state a claim was granted. In that posture, only the allegations of the complaint (*i.e.*, the contract's purported shortcomings in disclosure) are considered. The court of appeals therefore did not comment on the conduct allegations and they are not properly before this Court.

limits or had limits higher than market rates;[13] and loans made recently at lower interest rates. In addition, between 1980 and 1983 fifteen states implemented DIDMCA's provision for opting out of the federal usury preemption and returning to state-imposed usury standards.[14] In those states, therefore, DIDMCA provided the basis for lending only until the effective date of each state's override legislation. In addition, eight other states have eliminated usury limits for some or all manufactured home loans.[15] Some

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[13] *Mobile Home Usury Preemptions: Hearing Before the Subcomm. on Financial Institutions and Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 99th Cong., 1st Sess. 220 (1985).

[14] Under DIDMCA § 501(a)(2) (94 Stat. 162) states were given the opportunity, until April 1, 1983, to override the preemptive provisions of the Act. The following states did so (the effective dates of the override laws are noted in parentheses): Colo. Rev. Stat. § 5-13-105 (Supp. 1985) (July 1, 1981); Ga. Code Ann. § 7-4-20 (Supp. 1985) (Mar. 31, 1983); Hawaii Rev. Stat. § 478-12 (Supp. 1984) (May 30, 1980); Idaho Code § 28-49-105 (Supp. 1985) (Mar. 31, 1983); 1980 Iowa Acts ch. 1156, § 32 (May 9, 1980); Kan. Stat. Ann. § 16-207a (1981) (May 17, 1980); Me. Rev. Stat. Ann. tit. 9-A, § 1-110 (Supp. 1985) (May 18, 1983); 1981 Mass. Acts ch. 231, § 2 (Sept. 2, 1981); Minn. Stat. Ann. § 47.203 (West Supp. 1986) (June 2, 1981); 1982 Neb. Laws L.B. 623 (July 17, 1982); 1981 Nev. Stat. ch. 668, § 11 (June 14, 1981); N.C. Gen. Stat. § 24-2.3 (Supp. 1985) (Mar. 31, 1983); 1981 S.C. Acts No. 6 (Mar. 2, 1981); 1982 S.C. Acts No. 385; S.D. Codified Laws Ann. § 54-3-15 (Supp. 1984) (Mar. 5, 1981); 1981 Wis. Laws ch. 45, § 50 (Nov. 1, 1981).

[15] See Ariz. Rev. Stat. Ann. §§ 44-1201(A), 44-6002 (Supp. 1985); Cal. Health & Safety Code § 18039.5 (West 1984); Mont. Code Ann. § 31-1-241(1) (1985); N.H. Rev. Stat. Ann. § 361-A:8 (1984); N.M. Stat. Ann. § 56-8-11.1 (Supp. 1985); Or. Rev. Stat. § 82.010 (1985); Utah Code Ann. §§ 15-1-1, 70C-2-101 (Supp. 1985); Va. Code §§ 6.1-330.37, 6.1-330.21 (1983); *id.* §§ 46.1-515 *et seq.* (1980 & Supp. 1985). In other states, there are no interest limits for certain types of loans, but it is unclear from the statutes whether loans for the purchase of mobile homes fall within those provisions. *E.g.*, Ala. Code § 8-8-5 (1984); Alaska Stat. § 45.45.010(b) (Supp. 1985) (no limit for

of the remaining states adjusted their interest rate ceilings upward to reflect market conditions, so that as a practical matter Section 501 became progressively less significant in stimulating loans.[16] Nevertheless, the Bank Board estimates that of the $26 billion in outstanding credit secured by mobile homes, at least $4 billion is dependent on federal preemption.

The court of appeals' ruling would make the enforceability of these loans not only uncertain but dependent in many instances on judicial construction of language alleged to be inconsistent with the notice regulation. The decision will, in the Bank Board's view, have a direct effect on the secondary market for such mortgage loans (and securities backed thereby).[17] This is a market in which

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loans over $25,000); Conn. Gen. Stat. Ann. § 37-9 (West Supp. 1985) (no limit for loans extended by certain financial institutions); Del. Code Ann. tit. 5, § 2907 (Supp. 1985) (motor vehicle financing); Ill. Ann. Stat. ch. 17, § 6404 (Smith-Hurd Supp. 1985); Ky. Rev. Stat. Ann. § 360.150(2) and (13) (Bobbs-Merrill Supp. 1984); *id.* § 360.010(1)(b); N.J. Stat. Ann. § 17:16C-41 (West 1984); N.Y. Pers. Prop. Law § 404(1) (McKinney Supp. 1986) (retail installment sales); Wyo. Stat. § 40-14-212 (Supp. 1985) (no limit over $25,000); *id.* § 40-14-348 (no limit over $25,000).

[16] Market interest rates are at present below the usury limits in virtually all states; there is, accordingly, no substantial reliance on federal preemption at this time. Market conditions are not static and could of course alter that situation.

[17] Because the court of appeals' decision in *Quiller* is interlocutory, the direct impact of the decision on the parties is unknown. The plaintiffs contend that under the state law in effect at the time the suit was commenced (Ga. Code Ann. §§ 10-1-30 *et seq.* (1982)), the penalty for wilful excessive interest rates was forfeiture of the entire finance charge ($31,417.40) plus twice that amount as a penalty. The Georgia law has since been amended, however. In 1983, Georgia repealed all interest rate limitations on motor vehicle loans, including mobile homes (Ga. Code Ann. §§ 7-4-3, 7-4-5 (Supp. 1985)). Under the new law, violations of disclosure provisions will result in damage awards no smaller than $100 and no greater than $1,000. Recent Georgia Supreme Court decisions strongly suggest that the state would

Congress expressly sought to ensure stability (see S. Rep. 96-368, *supra*, at 19 ("it is the Committee's intent that loans originated under this usury exemption will not be subject to claims of usury even if they are later sold to an investor who is not exempt under this section")). We therefore suggest that, notwithstanding the absence of a conflict among the circuits, this Court should put an early end to the potential dislocation that could be caused by the decision below by reviewing the question whether preemption can be defeated by contract language that does not accurately state the borrower's federal right to notice.[18]

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apply these amendments to the instant case. See *Ward* v. *Hudco Loan Co.*, 254 Ga. 294, 328 S.E.2d 729, 730-731 (1985); *Fountain* v. *Dixie Finance Corp.*, 252 Ga. 543, 314 S.E.2d 906, 907-908 (1984); see *Ehrman* v. *Manning*, 177 Ga. App. 442, 339 S.E.2d 652 (1986). One federal district court decision that preceded *Ward*, however, indicates that the matter is not free from doubt. *Doyle* v. *Southern Guaranty Corp.*, No. CV 184-180 (S.D. Ga. Jan. 15, 1985).

The interlocutory posture of the *Quiller* case need not deter this Court's review. The important federal statutory issue has been resolved with finality for purposes of the case. Unless it is reversed, the decision below will control all further proceedings in *Quiller* and will govern the decisions in the related cases currently pending in the Eleventh Circuit (see 85-541 Pet. 8 n.4).

[18] That is the essence of the second question presented in No. 85-541, the only question in the three petitions that merits a grant of certiorari. The first question in No. 85-541 turns on the particular language in the Quiller-Barclays contract and is of little consequence other than to the parties. The same is true of question two in No. 85-584. The remaining questions in Nos. 85-584 and 85-717 would be resolved by a decision in No. 85-541. Accordingly, if certiorari is granted on question two in No. 85-541, the other cases should be held pending this Court's disposition. Should the petition in No. 85-541 be denied, however, then the companion petitions should also be denied.

CONCLUSION

The petition for a writ of certiorari in No. 85-541 should be granted with respect to the second question presented and the petitions in Nos. 85-584 and 85-717 should be disposed of in light of this Court's disposition in No. 85-541.

Respectfully submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
LOUIS R. COHEN
Deputy Solicitor General
JAMES M. SPEARS
Deputy Assistant Attorney General
JERROLD J. GANZFRIED
Assistant to the Solicitor General
ANTHONY J. STEINMEYER
BRUCE G. FORREST
Attorneys

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC., *Petitioner*,
v.

ARTHUR QUILLER, *et al.*, *Respondents.*

JACK GRANT, JR., *et al.*, *Petitioners*
v.

GENERAL ELECTRIC CREDIT CORPORATION, *Respondent.*

ARTHUR QUILLER, *et al.*, *Petitioners*,
v.

BARCLAYSAMERICAN/CREDIT, INC., *Respondent.*

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

JAY M. SAWILOWSKY
Counsel of Record for Quiller, et al
902 Georgia Railroad Bank Bldg.
Augusta, GA 30901
(404) 722-8853

JOHN B. LONG, Attorney for Quiller, *et al* and Grant, *et al*
NIXON YOW WALLER & CAPERS
1500 Georgia Railroad Bank Bldg.
Augusta, GA 30910
(404) 722-7541

THOMAS W. TUCKER
Counsel of Record for Grant, et al
DYE MILLER TUCKER & EVERITT
P.O. Box 2426
Augusta, GA 30903
(404) 722-0771

JOHN BELL TOWILL
DAVID E. HUDSON,
Attorneys for Grant, *et al*
HULL TOWILL NORMAN & BARRETT
P.O. Box 1564 (13)
Augusta, GA 30913
(404) 722-4481

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Nos. 85-541, 85-584 and 85-717

BARCLAYSAMERICAN/CREDIT, INC., *Petitioner,*

v.

ARTHUR QUILLER, *et al.*, *Respondents.*

JACK GRANT, JR., *et al.*, *Petitioners,*

v.

GENERAL ELECTRIC CREDIT CORPORATION, *Respondent.*

ARTHUR QUILLER, *et al.*, *Petitioners,*

v.

BARCLAYSAMERICAN/CREDIT, INC., *Respondent.*

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

I. The Depository Institutions Deregulation And Monetary Control Act Of 1980 Was Not An Absolute Preemption Statute.

The fallacy of the position of the United States that the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) only governs conduct subsequent to the time of a transaction is two-fold: (1) it ignores the language of DIDMCA and (2) it ignores the fact that DIDMCA was not an absolute preemption statute that preempted all state laws governing the finance charges that could be assessed on mobile home credit sale transactions and loan transactions.[1]

For example, let the following be answered: would a lender, which elected not to pay the price for preemption and which did not charge finance charges in excess of applicable state law be subject to a suit

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[1] The United States erroneously refers to the term "usury," a term which relates to the charging of excessive interest on loans. *See Phillips v. Allis-Chalmers Credit Corp.*, 177 Ga.App. 323, 339 S.E.2d 302, 303 (1985). The *Quiller* transaction and the *Grant* transaction, like most mobile home credit transactions, involve a "time-price sale" arranged by dealers who in turn discounted the mobile home contracts to finance companies. Transactions such as this are generally governed by comprehensive state retail installment sales acts. In this case, both the *Quiller* and *Grant* transactions were governed by the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30, et seq. Credit is prearranged between the dealer and finance company and financing is generally tied to the trailer. The financing market is captive as opposed to the financing of conventional homes which are generally financed by loans from third parties. Contrary to the implications made by the United States in Note 17, the rights of the Quillers and Grants under this statute are contractual obligations which cannot be abrogated by subsequent amendments to Georgia statutes.

enjoining conduct inconsistent with DIDMCA and the consumer protection regulations promulgated thereunder when it computed finance charges pursuant to the Rule of 78s, when it assessed late charges after only 10 days, when it immediately and without notice accelerated the payments or when it immediately and without notice repossessed a mobile home or foreclosed a security interest? The answer is absolutely NO!

The United States, on p.11, Note 10, admits that any failure to comply with 12 C.F.R. § 590.4(d)(e)(f) and (g) which is discernable on the face of the contract would result in loss of preemption. Those regulations govern balloon payments, prepayment penalties, late charges and deferral fees. Those regulations were enacted in order to comply with DIDMCA § 501(c)(1). DIDMCA, § 501(c)(2) mandates the notice of default and the right to 30 days in which to cure the default. These are even more important protections. Both these sub sections are exactly coordinate and are, in fact, part of the same sentence of DIDMCA which referred unmistakably to the content or the "terms and conditions" of the credit sale contract. There is not even a whisper in DIDMCA about any "self-enforcing" provisions.

The mobile home finance industry, in urging Congress to enact the mobile home section of DIDMCA, told Congress that credit sales utilizing the "Rule of 78s" and credit sales "failing to incorporate appropriate purchaser protections drawn from the traditional real estate mortgage field" would not be entitled to the preemption of state laws governing

finance charges.[2] The traditional real estate mortgage field has long utilized uniform promissory note forms and mortgage forms that have been approved by the Federal Home Loan Mortgage Corporation (FHLMC) and by the Federal National Mortgage Association (FNMA). These forms that are utilized nationwide contain a contractual right to a notice of default and a contractual right to 30 days in which to cure the default.[3]

Section 501(c) of DIDMCA was consistent with what was requested by the mobile home finance industry; that is, a limited preemption of state laws that only applied to certain "federally related mortgage lenders" who drafted contracts with "terms and conditions" that complied with DIDMCA and the consumer protection regulations enacted by the Federal Home Loan Bank Board (FHLBB). While granting the FHLBB broad discretion in formulating these consumer protection regulations, Congress specifically required that in connection with preemption transactions, mobile home purchasers would have as a "term and condition" of their contract a right to a notice of default and 30 days in which to cure the default prior to repossession or foreclosure (except in cases of abandonment or extreme circumstances), a provision consistent with the contractual provisions

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[2] *Mobile Home Usury Preemptions: Hearing Before the Subcomm. on Financial Institutions and Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, S.Hrg. 99-1382 (hereinafter referred to as 1985 Senate Hearings), p.207-208, testimony presented by Mr. Will Ehrle on behalf of the Coordinating Counsel on Manufactured Housing Finance, February 21, 1980, and appearing in this November, 1985 testimony.

[3] Case No. 85-541, Quiller Appendix N, p.58a.

contained in traditional real estate mortgage documents. DIDMCA § 501(c)(2).

At the time the consumer protection regulations were proposed and adopted, the FHLBB's position was clear that creditors would be entitled to preempt state law only if their contracts were consistent with those regulations. 45 Fed.Reg. 31122 (May 12, 1980); 45 Fed.Reg. 43681 (June 30, 1980). Thus, both Congress and the FHLBB understood at the time of the enactment of DIDMCA and the adoption of the consumer protection regulations that creditors would not be entitled to preempt state laws governing finance charges if consumers were not granted a right to a notice of default and a right to cure that default within 30 days prior to repossession or foreclosure. It was also the obvious intent of both that if the "terms and conditions" of the mobile home contract contained language inconsistent and antagonistic with the requirements of the consumer protection regulations contained at 12 C.F.R. § 590.4, the contract did not preempt state law. Creditors whose contracts did not comply with DIDMCA, § 501(c), and 12 C.F.R. § 590.4 did not lose any preemption; they merely never qualified for it in the first instance.

II. DIDMCA, § 501(c) Requires That In Order For Contracts To Be Entitled To Preemption, Consumers Be Granted A Contractual Right To Notice Of Default And A Contractual Right To Cure That Default Within 30 Days.

While Congress granted broad authority to the FHLBB to promulgate consumer protection regulations, it mandated that consumers be given a notice of default and 30 days in which to cure the default prior to repossession or foreclosure (except in cases

of abandonment or extreme circumstances). DIDMCA, § 501(c)(2). Under the Uniform Commercial Code, a creditor is entitled to peaceably repossess a mobile home immediately and without notice unless the creditor's right is modified by contract. *Ford Motor Credit Company v. Hunt*, 241 Ga. 342, 245 S.E.2d 295 (1978); U.C.C. Art. 9, § 503. The only way the consumer is going to have the right to notice of default and the right to cure that default within 30 days is for that right to exist by virtue of the terms and conditions of the contract. If the contract is silent on the subject, the debtor is subject to U.C.C. Art. 9, § 503.[4]

The United States argues that obligations imposed by law could not be dispensed with by agreement of the parties. However, that argument presupposes that all mobile home credit sale contracts had been preempted by DIDMCA. The only way to determine whether or not a contract is governed by state law

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[4] The United States correctly points out that the Eleventh Circuit Court of Appeals rejected this argument. However, in doing so, the Court relied heavily on the "Vartanian" letter. Between the date of the panel opinion and *en banc* briefing, this letter was exposed for exactly what it was, an unofficial opinion solicited *ex parte* at the request of General Electric Credit Corporation in order to defeat litigation pending in the state courts of Arkansas. No efforts were made to "publish" or "promulgate" this unofficial letter until after the requesting party determined that it was beneficial to it. If letters such as the "Vartanian" letter can determine issues such as those being presented here, then issues such as this will be decided depending upon what party in litigation has the most clout with a particular governmental agency. As the Federal Register does not contain any proposed amendment to the regulations, evidently this process continues. See page 4 of the Supplemental Brief filed by General Electric Credit Corporation in Opposition to Petition.

or whether or not the lender has paid the price for preemption is to review the "terms and conditions" of the contract. Otherwise, creditors do exactly as was done in the *Quiller* case, that is, they argue that the contract is governed by some other statute.[5]

Mobile home contracts such as those used in the *Grant* and *Quiller* cases are typical contracts of adhesion. Purchasers are frequently unaware of complicated rules of contract construction and such contracts should be construed through the eyes of the typical consumer to determine whether or not the finance company used terms and conditions to impose illegal burdens upon the consumer. *See* Rakoff, *Contracts of Adhesion*, 96 Harv.L.R. 1174 (1983).

III. The Eleventh Circuit Court Of Appeals' Ruling In *Quiller* Does Not Cast Doubt On The Enforceability Of Large Quantities Of Outstanding Mobile Home Transactions.

The United States, like certain mobile home finance companies who have appealed to Congress for retroactive pardons, has been unable to offer any specific figures to support its "sky is falling" arguments. However, numerous finance companies and lenders, in drafting their contracts, have paid specific attention to the "price for preemption" and have specifically granted as a term of the contract the right to notice of default and a contractual right to cure that

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[5] The United States argues in fn.12 that based on the language of the complaint, the *in judicio* admissions in the pleadings by BarclaysAmerican, as well as the *in judicio* admissions concerning the conduct of BarclaysAmerican are irrelevant since the district court dismissed this case on a FRCP 12(b)(6) motion. This argument ignores notice pleading under the Federal Rules of Civil Procedure. *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957).

default within 30 days, and have insured that the other terms and provisions were consistent with those consumer protections contained in DIDMCA § 501(c) and in 12 C.F.R. § 590.4.[6] In answering questions posed by the Senate, trade organizations representing BarclaysAmerican produced a copy of the current form contract used by BarclaysAmerican, which specifically grants consumers a contractual right of notice of default and a contractual right to cure that default within 30 days, and which has other terms and conditions which are consistent with DIDMCA and the consumer protection regulations contained at 12 C.F.R. § 590.4.[7] The fact of the matter is that only a few finance companies are known to have charged finance charges in excess of those permitted by state law while not paying the price for preemption. These finance companies, whose contracts are in violation of state law, are subject to the remedies provided by state law and arguments concerning the economic consequences to either party are irrelevant and *de hors* the record.

CONCLUSION

Adherence to the statutory language of DIDMCA demands that the "terms and conditions" of the credit sale contract be considered in determining whether or not state law has been preempted.[8] The United States has ignored this principle for purposes of ex-

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[6] 1985 Senate Hearings, *supra*, p.20, p.51-52, 53-54, 55-56.

[7] *Id.*, p.270-271.

[8] *See Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 474 U.S. ___, 88 L.Ed.2d 691 (1986).

pediency and for perceived economic considerations. A position like that taken by the United States would give credence to the legal philosophy "that the law is no more than a means by which unjust power relations are dressed in the costume of external truths."[9]

The issues in No. 85-584 involve important questions of federal law which have, in part, been emasculated and obscured by unofficial opinions and varying positions of the FHLBB obtained *ex parte* in an effort to support certain arguments contrary to the clear and unambiguous language of DIDMCA. This Court should decide these issues and grant the petition for writ of certiorari in No. 85-584. The petition in No. 85-717 should be granted only if this Court grants the petition in No. 85-541.

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[9] *Time*, Nov. 18, 1985, p.87. *The New York Times*, Oct. 6, 1985, p.58, discussing Critical Legal Studies.

Respectfully submitted,

JAY M. SAWILOWSKY
902 Georgia Railroad Bank Bldg.
Augusta, GA 30901
(404) 722-8853

JOHN B. LONG
Of Counsel:
NIXON, YOW, WALLER & CAPERS
1500 Georgia Railroad Bank Bldg.
Augusta, GA 30910

THOMAS W. TUCKER
Of Counsel:
DYE, MILLER, TUCKER & EVERITT
P.O. BOX 2426
Augusta, GA 30903

JOHN BELL TOWILL
DAVID E. HUDSON
Of Counsel:
HULL, TOWILL, NORMAN & BARRETT
P.O. Box 1564 (13)
Augusta, GA 30913